NO. 82-1032



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,
Plaintiff-Petitioner,

versus

DIAMOND M DRILLING COMPANY,
Defendant-Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

## REPLY BRIEF BY RESPONDENT DIAMOND M DRILLING COMPANY IN OPPOSITION TO AMICUS CURIAE BRIEF OF MISSISSIPPI TRIAL LAWYERS ASSOCIATION

---

LLOYD C. MELANCON, ESQ.
Counsel for Diamond M Drilling
Company
912 Pere Marquette Building
150 Baronne Street
New Orleans LA 70112
504 523-5116

Of Counsel:
Messrs. McLoughlin, Barranger
Provosty and Melancon

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

*CASES:*

## TABLE OF AUTHORITIES (Continued)

## SUMMARY OF ARGUMENT

The amicus curiae brief of the Mississippi Trial Lawyer's Association, raises no new arguments in support of the petition for a writ of certiorari. Amicus adopts the petitioner's central argument that there is a conflict among the standards used by the Courts of Appeals in reviewing motions for directed verdict or judgment n.o.v. While this issue has been exhaustively briefed by petitioner and respondent, Diamond M Drilling is constrained to correct the amicus's mischaracterization of the standards employed by the Courts of Appeals.

This Court should deny the petition for a writ of certiorari because the Courts of Appeals apply consistent standards of review of motions for directed verdict or judgment n.o.v. The Fifth Circuit's standard of review is consistent with those of the Second and Ninth Circuits. No court will permit a jury verdict to stand in a 33 U.S.C.A. 905(b) case when it is supported only by a scintilla of evidence. The circuits agree that the evidence must be substantial and direct. Evidence that merely permits the jury to speculate or surmise is not substantial evidence and will not support a jury verdict. In evaluating the quality of the evidence, the courts use a "reasonable man" standard. The courts agree that a section 905(b) plaintiff has a heavier land-based burden of proof than does his Jones Act or Federal Employers Liability Act counterpart. The decisions of the Courts of Appeal are not in conflict and the petition should be denied.

## ARGUMENT

### THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS' DECISIONS REVIEWING MOTIONS FOR DIRECTED VERDICT OR JUDGMENT NON OBSTANTE VEREDICTO

This Court should not grant a writ of certiorari in this case because the standards of review used by the Courts of Appeal in 33 U.S.C.A. 905(b) cases do not conflict. The amicus follows the approach of the petitioner and attempts to secure a writ of certiorari by pointing to an illusory conflict among the standards of review utilized by the Courts of Appeal. No such conflict exists.

The Fifth Circuit's standard of review is consistent with those of the Second and Ninth Circuits. The Fifth Circuit standard, as announced in *Boeing Company v. Shipman*,[1] is that "[a] mere scintilla of evidence is insufficient to present a question for a jury."[2] The other circuits, though their phraseology may differ, apply the same test: no circuit will uphold a verdict in a section 905(b) case supported only by a scintilla of evidence. Neither the amicus nor the petitioner have shown that any of the other circuits have applied a contrary standard of review.

The standard of review applied by the Second Circuit in *Mattivi v. South African Marine*[3] is the same standard used by the Fifth Circuit in *Boeing* and the instant case.

---

1/ 411 F.2d 365 (5th Cir. 1969).

2/ *Id.* at 374.

3/ 618 F.2d 163 (2d Cir. 1980).

The main thrust of the argument of the amicus is that the Second Circuit, by citing a Jones Act case, has chosen to adopt the stricter Jones Act and FELA standard of review in Section 905(b). However, a reading of *Mattivi* shows that the Jones Act standard of review was not applied in that case. A side-by-side comparison of the language of the *Mattivi* 4/ and *Boeing* 5/ cases shows that the Second and Fifth Circuits are in unison.

| *MATTIVI* | *BOEING* |
| --- | --- |
| Thus, when deciding whether to grant a judgment n.o.v., the trial court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury. Rather, after viewing the evidence in a light most favorable to the non-moving party (giving the non-movant the benefit of all reasonable inferences), the trial court should grant a judgment n.o.v. only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have | On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On |

4/ *Id.* at 167-68.

5/ 411 F.2d at 374.

been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

More importantly, however, the Fifth Circuit and the Second Circuit apply these tests in the same manner. In *Mattivi*, the court specifically noted that "an LHWCA plaintiff [is] governed by a heavier land-based burden of proof" than is a Jones Act plaintiff. 6/ The Fifth Circuit has consistently imposed this heavier land-based burden on section 905(b) plaintiffs. 7/ In upholding the trial court's grant of a judgment n.o.v., the Second Circuit in *Mattivi* stated, "[t]he trial court looked at the evidence in a light most favorable to Mattivi and correctly concluded that given the complete absence of *substantial* evidence supporting the verdict, the jury's findings could only have been the result of sheer surmise and conjecture." 8/ Similarly, the

6/ 618 F.2d at 168.

7/ *See, Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982); *McCormack v. Noble Drilling Corporation of California*, 608 F.2d 169 (5th Cir. 1979); *Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981); *Stockstill v. Gypsum Trans.*, 607 F.2d 1112 (5th Cir. 1979), *cert. denied*, 451 U.S. 969 (1981); *Samuels v. Empresa Lineas Martimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979).

8/ 618 F.2d at 169.

Fifth Circuit overturned the jury verdict in the present case because "a close examination of the record shows that on this issue the jury was left to rely on speculation and conjecture." 9/ Both circuits, therefore, adopt the position that a jury verdict in a section 905(b) case cannot stand in the absence of substantial evidence to support the jury verdict.

The Second and Fifth Circuits agree on the formulation and application of the standard of review of jury verdicts. Both courts agree that the land-based standard of review is applicable in section 905(b) cases. Both courts refused to let a jury verdict stand if it is supported only by a scintilla of evidence. There is, therefore, no conflict between the Second and Fifth Circuit decisions.

The Ninth Circuit's standard of review is consistent with that of the Second and Fifth Circuits. Amicus cites the Ninth Circuit case of *Turner v. Japan Lines*, 10/ which stated that the court will not override a jury verdict "unless we find that the evidence was insufficient as a matter of law to support [the] verdict - - that the evidence was such that no reasonable men would accept it as adequate to establish the existence of each fact essential to liability." 11/ Amicus contends that this language establishes a standard of review completely different from the other circuits. Both the Second and Fifth Circuit, however, use a "reasonable man"

---

9/ *Doucet v. Diamond M Drilling*, 683 F.2d 886, 893 (5th Cir. 1982).

10/ 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 278, 103 S.Ct. 294 (1982).

11/ *Id.* at 1304.

standard in passing on motions for directed verdict and judgment n.o.v. The court in *Mattivi* stated that a motion will be granted if "the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against it." 12/ Similarly, the Fifth Circuit in *Boeing* stated "[I]f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the case should be submitted to the jury." 13/

In *Turner*, the court overturned a judgment n.o.v. not on the basis of a scintilla of evidence supporting plaintiff's case, but on the basis of substantial, direct evidence. Plaintiff offered testimony of experts to establish the safety practices of the industry. Plaintiff also produced evidence that the ship's crew supervised the unloading and the storage of the cargo was obviously and unreasonably dangerous. 14/ The direct evidence provided a firm basis for the jury's verdict; it did not require the jury to "speculate" as to the ship's negligence. The Ninth Circuit standard has the same effect as the Second and Fifth Circuit standards: a mere scintilla of evidence, that is, evidence that merely permits the jury to speculate or surmise, is insufficient to support a jury verdict. The standards of review of all three circuits are consistent. There is no "unmistakable" conflict in Second, Fifth

12/ 618 F.2d at 168.

13/ 411 F.2d at 374.

14/ 651 F.2d at 1304-05.

and Ninth Circuits' scope of review. 15/

A conflict among the circuits does not exist merely because the courts nave used different words to describe the standard of review. As Professors Wright and Miller point out after their examination of the Second Circuit's standard, "Although, as has been indicated, courts have used other phrases than the one preferred here to describe the standard of sufficiency of evidence, it is unlikely that there is any real difference in result." 16/

However the courts may describe the standard, they all agree on its meaning and its application. Neither amicus nor petitioner have shown that the courts look to different evidence in evaluating a jury's verdict in a 905(b) action. Rather, the courts uniformily take all of the evidence in without reweighing, view it in the light and with the inferences most favorable to the party opposing the motion. 17/

---

15/ In the two antitrust cases cited by amicus, *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, ___ U.S. ___ (Nov. 8, 1982, Docket No. 82-277); and *Venture Technology, Inc. v. National Fuel Gas Distribution Corporation*, ___ F.2d ___ (2d Cir. 1982), *cert. denied*, ___ U.S. ___ (Nov. 8, 1982, Docket No. 82-362), Justice White dissented from the denial of a writ of certiorari because the conflict between the circuits was "unmistakable." 51 U.S.L.W. 3362, n. 1 (1982).

16/ 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 547 (1971).

17/ See, e.g., *Doucet*, 683 F.2d at 889, n.2; *Mattivi*, 619 F.2d at 167; *Johnson v. A/S IVARANS REDERI*, 613 F.2d 334, 351 (1st Cir. 1980), *cert. denied*, 499 U.S. 1135 (1981).

When this evidence amounts to nothing more than a scintilla, the courts will set aside the jury's verdict.[18] The Courts of Appeals apply consistent standards of review.

## CONCLUSION

The decision of the Fifth Circuit did not address an important and unresolved question of Federal Law that this Court should settle. The Fifth Circuit's opinion is consistent with decisions in the same and other circuits. Finally, the Court of Appeals decided this case in a way that conforms with the decisions of this Court. It is not the opinion of the Fifth Circuit that stands naked, it is petitioner who has neglected to clothe his argument with legal authority. Accordingly, the petition for writ of certiorari is without merit and should be dismissed.

Respectfully submitted,

(SIGNED) LLOYD C. MELANCON

Of Counsel:
Messrs. McLoughlin, Barranger,
Provosty and Melancon

---

18/ See Text Accompanying 8, 9 and 14 Supra.

## CERTIFICATE OF SERVICE

It is hereby certified that 3 copies of the above and foregoing brief were served by depositing such in a mailbox of the United States Postal Service with first-class postage affixed on the envelopes addressed, as follows:

I. Jackson Burson, Jr., Esq., of Messrs. Young and Burson, counsel for Mr. Herman J. Doucet, P. O. Box 985, Eunice, Louisiana 70536-0985; and,

James A. George, Esq., of Messrs. George and George, counsel for Mississippi Trial Lawyers Association, 8110 Summa Drive, Baton Rouge, Louisiana 70809,

In accordance with the provisions of U.S. Sup. Ct. Rule 28.3, this 14th day of February 1983.

(SIGNED) LLOYD C. MELANCON

## APPENDIX

Law Offices
McLoughlin, Barranger, Provosty and Melancon
912 Pere Marquette Building
150 Baronne Street

1922 Frank McLoughlin
Kenneth C. Barranger
Michel O. Provosty
Lloyd C. Melancon

Telephone
523-5116

New Orleans, Louisiana 70112

December 22, 1982

Messrs. George and George
8110 Summa Drive
Baton Rouge, LA 70809

Attention Mr. Gary Koederitz

Re: Doucet v. Diamond M.
Supreme Court No. 82-1032. Our LM0537.

Please accept this as a confirmation of today's telephone discussions between Mr. Koederitz and the writer wherein on the limited information presently available to us, respondent Diamond M Drilling Company indicated it does not

favor an amicus curiae brief being now filed by the Mississippi Trial Lawyers Association, supporting the petition for writ of certiorari by Mr. Herman J. Doucet, in accordance with the provisions of the Supreme Court Rules, Rule 36, in the captioned Docket.

Simply stated, the petition involves the adjudication of a typical Louisiana offshore third-party LHWCA 905(b) personal injury claim advanced by an independent contractor's employee against Diamond M, tried in the District Court and reversed by the Fifth Circuit. In that litigation, no outside interest whatsoever was manifested by anyone through the denial by the latter of a petition for rehearing and en banc review, so that we are at a loss to fully understand your unusual concern manifested at this late date.

Perhaps if you could please elaborate and furnish us with the details of your interest, we would be better able to intelligently advise our client thereon and make a recommendation. Objectively speaking and at this point of time with what we know about the inquiry, it is indeed unthinkable that your firm might even have a position one way or the other as to the outcome or decision on Mr. Burson's routine type petition. In this connection the copiously and lengthy curriculum vitae of Mr. George published throughout the area would tend to suggest that the interest of your client might better be served in other more significant pro-plaintiff litigation. In any event, yours is the only request thereon and we have not been solicited on this subject by any defense organization.

With all good wishes for Christmas and the New Year, we remain

Very truly yours,

/s/ Lloyd C. Melancon

Lloyd C. Melancon

LCM/ls